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**No. 82-1518**

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1982

**DENNIS LUTHER LEWIS,**  
*Petitioner,*

vs.

**STATE OF INDIANA,**  
*Respondent.*

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI TO THE  
SUPREME COURT OF INDIANA**

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**THE QUESTION PRESENTED FOR REVIEW**

Whether the United States Constitution prohibits the invocation of the Indiana rape shield law once a State's witness made an unsolicited and inadvertent remark concerning the rape victim's marital trustworthiness.

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Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari directed to the Supreme Court of Indiana, thereby refusing to review the decision entered by the Court in Cause No. 382 S 107 on October 27, 1982.

**OPINION BELOW**

The Supreme Court of Indiana entered an opinion in this cause on October 27, 1982. This opinion may be found in Petitioner's Appendix at A-1 and is unofficially reported at 440 N.E.2d 1125. The unpublished order of the Supreme Court of Indiana denying rehearing was entered on January 18, 1983 and appears in Petitioner's Appendix at B-1.

## REASONS WHY THE WRIT SHOULD BE DENIED

The Petitioner contends the State of Indiana denied him due process and the right to confront the witnesses against him by invoking the rape shield law and preventing the admission of evidence of the rape victim's prior marital infidelities. In support of this contention he maintains the State waived the rape shield law when it "placed Mrs. Rogers' character in evidence *when on direct examination* (T 333) it examined her husband concerning her fidelity and trustworthiness" (Petitioner's Emphasis) (See Petitioner's Petition for Writ of Certiorari at p. 6). The Petitioner misstates the facts in that he repeatedly infers that the State deliberately injected<sup>1</sup> into the case the victim's moral and chaste character. This did not occur. In reality, the victim's husband, in answering a question unrelated to the victim's moral character, made an *inadvertent remark* to the effect that they had a trustworthy marriage.

The Petitioner claims the Indiana Supreme Court's decision conflicts with the decisions of other state courts of last resort which have held that in some instances, the rape shield law does not apply to block evidence of the victim's prior sexual behavior. He cites *State v. LaClair*, \_\_\_ N.H. \_\_\_, 433 A.2d 1326 (1981); *Commonwealth v. Joyce*, \_\_\_ Mass. \_\_\_, 415 N.E.2d 181 (1981); and *in accord*, *State v. Hudlow*, \_\_\_ Wash. App. \_\_\_, 635 P.2d 1096 (1981); *State v. Baron*, \_\_\_ N.C. App. \_\_\_, 292 S.E.2d 741 (1982). However, all of his cases are distinguishable. None of these cases hold that the U.S. Constitution prevents the application of the rape shield law upon an inadvertent remark by any witness.

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<sup>1</sup> The Indiana Supreme Court opinion in this case made a factual error regarding the testimony of the victim's husband wherein he related they had a "trustworthy relationship." The court's opinion states this occurred during cross-examination by the Defendant. However, the husband's remark occurred during direct when the State asked him a question unrelated to the victim's character or chaste behavior (R.333).

The cases the Petitioner cites all concern situations wherein the victim's prior actions, prior charges for prostitution or prior false statements were of such magnitude they directly and grossly affected her character as a witness. Furthermore, these cases were not decided upon constitutional grounds. To be sure Indiana has recognized instances wherein the rape shield law will not apply. See *Hall v. State*, \_\_\_ Ind. App., \_\_\_, 374 N.E.2d 62 (1979) wherein a letter which alluded to the victim's prior sexual activity but also showed her propensity to lie and falsely accuse others of rape was admitted.

It is true that an accused's right to cross-examine a State witness is implicit in the constitutional right of confrontation for it helps assure the accuracy of the truth in testing the witness's credibility. *Chambers v. Mississippi*, 410 U.S. 284 (1973). However, it is also recognized that there are appropriate cases in which the right to confront and cross-examine witnesses may bow to accomodate other legitimate state interests in a criminal trial. *Chambers, supra*; *Roviaro v. United States*, 353 U.S. 53 (1957); *Davis v. Alaska*, 415 U.S. 308 (1974). The victim in a rape case is not the person on trial and the State has an important and absolutely legitimate interest in preventing the admission of the irrelevant evidence of the victim's sexual past with persons other than the accused. The reason is that such evidence is insufficiently probative; its highly prejudicial effect outweighs any possible use it would have in the testing of her credibility as a witness or of her consent to intercourse with the defendant on a particular occasion. *United States v. Kasto*, 584 F.2d 268 (8th Cir., 1978).

The State of Indiana, as have many states, has recognized the state does have an interest in protecting rape victims with the evidentiary rape shield law. With the rape shield protection, rape victims are more inclined to report the crime than they were in the past when their entire prior sexual activities were admitted freely to test their credibility as witnesses.

**CONCLUSION**

The decision below is not in conflict with the decisions of other state courts of last resort. For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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